

## Message

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**From:** Dierker, Carl [Dierker.Carl@epa.gov]  
**Sent:** 8/9/2018 7:11:06 PM  
**To:** Dunn, Alexandra [dunn.alexandra@epa.gov]; Dixon, Sean [dixon.sean@epa.gov]; Williamson, Timothy [Williamson.Tim@epa.gov]; Williams, Ann [Williams.Ann@epa.gov]; Knapp, Michael [Knapp.Michael@epa.gov]; Moraff, Kenneth [Moraff.Ken@epa.gov]; Stover, Michael [Stover.Michael@epa.gov]  
**Subject:** Inside EPA article on ME WQS

In case you missed it...

### Daily News

## EPA Reverses Position On Maine Water Quality Standards, Seeks Remand

August 08, 2018

EPA has changed its position in litigation over its 2015 rejection of some of Maine's water quality standards (WQS) and is now asking a federal court to remand the issue to the agency for reconsideration rather than defend its decision, a move that is drawing opposition from tribal intervenors in the case who fear EPA will now allow weaker standards.

The agency's reversal, announced in a recent motion to the federal district court overseeing the suit, follows settlement negotiations with Maine that failed to resolve the issues in the case now known as *Maine v. Wheeler*, which involve a debate on how to set WQS that protect tribal uses of waters, including "sustenance" or "subsistence" fishing.

The suit also involves questions of whether EPA's effort to reconcile the provisions of the Maine Indian Claims Settlement Act, which gives Maine the authority to set WQS on tribal lands, with the requirements of the CWA violates the Administrative Procedure Act.

A national coalition of industrial companies, municipal entities and agricultural parties has urged the court to grant Maine's request to set aside EPA's 2015 WQS decisions for Maine, saying that if the agency uses a similar rationale in other states it could lead to unlawfully stringent effluent limits in discharge permits.

EPA in its recent motion to the U.S. District Court for the District of Maine seeking a voluntary remand of its 2015 decisions says the agency and "Maine have recently been involved in settlement discussions that would have obviated the need to litigate the merits if they had been successful. Those settlement discussions have now concluded without a negotiated resolution of this case."

Instead of moving forward with filing its merits brief in the case, however, the agency says it "has decided to change, and not to defend" its 2015 decisions about Maine's WQS.

These decisions include: interpreting and approving Maine's fishing designated use in its WQS to mean sustenance fishing in the waters in the Maine tribes' reservations and trust lands; approving provisions in the Maine Implementing Act as a sustenance fishing designated use under the CWA in the inland waters of the Penobscot Indian Nation's and Passamaquoddy Tribe's reservations; and disapproving Maine's human health criteria in its WQS as not sufficiently protective of the sustenance fishing designated uses in Indian waters.

"Because EPA has decided that it will revise the February 2015 decisions, it here seeks a voluntary remand of the February 2015 decisions in order to do so," EPA says.

The agency tells the court that it "is mindful that in 2017, it sought a stay in order to reconsider the February 2015 decisions and determined that it would not change the decisions at that time." But subsequent to that determination, the agency now has a new acting administrator, a new assistant administrator for water and a new Region 1 administrator, and has decided it will revise the 2015 decisions, EPA says.

EPA also asks the court to stay the briefing schedule on the merits of the case while it decides the remand motion.

### Tribe's Objection

But the Penobscot Nation, which is a defendant-intervenor in the case, is objecting to EPA's change in tack, charging the agency is attempting to avoid its trust obligation to protect tribal waters and has offered no valid reason to be relieved from its obligation to file a merits brief.

EPA "has a fiduciary responsibility to protect the Nation's reservation sustenance fishing resources" and should be required to file its merits brief, the Penobscot Nation says in [a recent brief](#) urging the court to keep to the original briefing schedule.

"Not doing so not only runs at cross-wires with the standing position" of the Department of Interior (DOI), which has said the trust relationship counsels protection of tribal fishing rights in Maine, "but would be tantamount to EPA reneging upon its trust obligations to protect the Penobscot Nation," the brief says.

DOI is the federal agency charged with administering the Maine settlement acts.

The Penobscot brief says that in a June 27 telephone conference with Region 1 Administrator Alexandra Dunn and Penobscot representatives, Dunn said EPA was prepared to file its brief the next day to fully defend the agency's decisions but that EPA and Maine wanted to stay the case for 30 days to explore a framework for settlement.

When the 30-day stay was about to expire, EPA informed Penobscot representatives July 27 that it would file a motion to voluntarily remand its decisions in order to reconsider them, the brief says.

"When Penobscot representatives asked for an explanation of the reasons for EPA's change of position, they were told by EPA representatives that one could not be provided and that they would see the explanation in the motion papers," the brief says. "When Penobscot representatives asked if DOI had been consulted about EPA's reversed course, they were told that EPA had not consulted with DOI, other than seeking a supplemental opinion that was filed in this case."

The court, in an [Aug. 2 order](#), has established a new briefing schedule that suspends briefing on the merits of the case and sets deadlines for responses to EPA's motion. Maine's response is due Sept. 14, and the Penobscot Nation's response to EPA's remand request is due Sept. 28.

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